

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—111th Cong., 2d Sess.

**S. 372**

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

Referred to the Committee on \_\_\_\_\_ and  
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT In the Nature of a Substitute intended to be  
proposed by \_\_\_\_\_

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Whistleblower Protec-
- 5 tion Enhancement Act of 2010”.

1 **TITLE I—PROTECTION OF CER-**  
2 **TAIN DISCLOSURES OF IN-**  
3 **FORMATION BY FEDERAL EM-**  
4 **PLOYEES**

5 **SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.**

6 (a) IN GENERAL.—Section 2302(b)(8) of title 5,  
7 United States Code, is amended—

8 (1) in subparagraph (A)(i)—

9 (A) by striking “a violation” and inserting  
10 “any violation”; and

11 (B) by adding “except for an alleged viola-  
12 tion that is a minor, inadvertent violation, and  
13 occurs during the conscientious carrying out of  
14 official duties,” after “regulation,”; and

15 (2) in subparagraph (B)(i)—

16 (A) by striking “a violation” and inserting  
17 “any violation (other than a violation of this  
18 section)”; and

19 (B) by adding “except for an alleged viola-  
20 tion that is a minor, inadvertent violation, and  
21 occurs during the conscientious carrying out of  
22 official duties,” after regulation,”.

23 (b) PROHIBITED PERSONNEL PRACTICES UNDER  
24 SECTION 2302(b)(9).—

1           (1) TECHNICAL AND CONFORMING AMEND-  
2           MENTS.—Title 5, United States Code, is amended in  
3           subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of  
4           section 1214, in subsections (a), (e)(1), and (i) of  
5           section 1221, and in subsection (a)(2)(C)(i) of sec-  
6           tion 2302, by inserting “or section 2302(b)(9)  
7           (A)(i), (B), (C), or (D)” after “section 2302(b)(8)”  
8           or “(b)(8)” each place it appears.

9           (2) OTHER REFERENCES.—(A) Title 5, United  
10          States Code, is amended in subsection (b)(4)(B)(i)  
11          of section 1214 and in subsection (e)(1) of section  
12          1221, by inserting “or protected activity” after “dis-  
13          closure” each place it appears.

14          (B) Section 2302(b)(9) of title 5, United States  
15          Code, is amended—

16                 (i) by striking subparagraph (A) and insert-  
17                 ing the following:

18                         “(A) the exercise of any appeal, complaint,  
19                         or grievance right granted by any law, rule, or  
20                         regulation—

21                                 “(i) with regard to remedying a viola-  
22                                 tion of paragraph (8); or

23                                 “(ii) with regard to remedying a viola-  
24                                 tion of any other law, rule, or regulation;”;

25                                 and

1 (ii) in subparagraph (B), by inserting “(i)  
2 or (ii)” after “subparagraph (A)”.

3 (C) Section 2302 of title 5, United States Code,  
4 is amended by adding at the end the following:

5 “(f)(1) A disclosure shall not be excluded from sub-  
6 section (b)(8) because—

7 “(A) the disclosure was made to a person, in-  
8 cluding a supervisor, who participated in an activity  
9 that the employee or applicant reasonably believed to  
10 be covered by subsection (b)(8)(A)(ii);

11 “(B) the disclosure revealed information that  
12 had been previously disclosed;

13 “(C) of the employee’s or applicant’s motive for  
14 making the disclosure;

15 “(D) the disclosure was not made in writing;

16 “(E) the disclosure was made while the em-  
17 ployee was off duty; or

18 “(F) of the amount of time which has passed  
19 since the occurrence of the events described in the  
20 disclosure.

21 “(2) If a disclosure is made during the normal course  
22 of duties of an employee, the disclosure shall not be ex-  
23 cluded from subsection (b)(8) if any employee who has au-  
24 thority to take, direct others to take, recommend, or ap-  
25 prove any personnel action with respect to the employee

1 making the disclosure, took, failed to take, or threatened  
2 to take or fail to take a personnel action with respect to  
3 that employee in reprisal for the disclosure.”.

4 **SEC. 102. DEFINITIONAL AMENDMENTS.**

5 Section 2302(a)(2) of title 5, United States Code, is  
6 amended—

7 (1) in subparagraph (B)(ii), by striking “and”  
8 at the end;

9 (2) in subparagraph (C)(iii), by striking the pe-  
10 riod at the end and inserting “; and”; and

11 (3) by adding at the end the following:

12 “(D) ‘disclosure’ means a formal or informal  
13 communication or transmission, but does not include  
14 a communication concerning policy decisions that  
15 lawfully exercise discretionary authority unless the  
16 employee or applicant providing the disclosure rea-  
17 sonably believes that the disclosure evidences—

18 “(i) any violation of any law, rule, or regu-  
19 lation, except for an alleged violation that is a  
20 minor, inadvertent violation, and occurs during  
21 the conscientious carrying out of official duties;  
22 or

23 “(ii) gross mismanagement, a gross waste  
24 of funds, an abuse of authority, or a substantial  
25 and specific danger to public health or safety.”.

1 **SEC. 103. REBUTTABLE PRESUMPTION.**

2 Section 2302(b) of title 5, United States Code, is  
3 amended by amending the matter following paragraph  
4 (12) to read as follows:

5 “This subsection shall not be construed to authorize the  
6 withholding of information from Congress or the taking  
7 of any personnel action against an employee who discloses  
8 information to Congress. For purposes of paragraph (8),  
9 any presumption relating to the performance of a duty by  
10 an employee whose conduct is the subject of a disclosure  
11 as defined under subsection (a)(2)(D) may be rebutted by  
12 substantial evidence. For purposes of paragraph (8), a de-  
13 termination as to whether an employee or applicant rea-  
14 sonably believes that such employee or applicant has dis-  
15 closed information that evidences any violation of law,  
16 rule, regulation, gross mismanagement, a gross waste of  
17 funds, an abuse of authority, or a substantial and specific  
18 danger to public health or safety shall be made by deter-  
19 mining whether a disinterested observer with knowledge  
20 of the essential facts known to and readily ascertainable  
21 by the employee could reasonably conclude that the actions  
22 of the Government evidence such violations, mismanage-  
23 ment, waste, abuse, or danger.”

1 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**  
2 **SONNEL PRACTICES.**

3 (a) **PERSONNEL ACTION.**—Section 2302(a)(2)(A) of  
4 title 5, United States Code, is amended—

5 (1) in clause (x), by striking “and” after the  
6 semicolon; and

7 (2) by redesignating clause (xi) as clause (xii)  
8 and inserting after clause (x) the following:

9 “(xi) the implementation or enforce-  
10 ment of any nondisclosure policy, form, or  
11 agreement; and”.

12 (b) **PROHIBITED PERSONNEL PRACTICE.**—

13 (1) **IN GENERAL.**—Section 2302(b) of title 5,  
14 United States Code, is amended—

15 (A) in paragraph (11), by striking “or” at  
16 the end;

17 (B) in paragraph (12), by striking the pe-  
18 riod and inserting “; or”; and

19 (C) by inserting after paragraph (12) the  
20 following:

21 “(13) implement or enforce any nondisclosure  
22 policy, form, or agreement, if such policy, form, or  
23 agreement does not contain the following statement:  
24 ‘These provisions are consistent with and do not su-  
25 persede, conflict with, or otherwise alter the em-  
26 ployee obligations, rights, or liabilities created by

1       Executive Order 13526 (75 Fed. Reg. 707; relating  
2       to classified national security information), or any  
3       successor thereto; section 7211 of title 5, United  
4       States Code (governing disclosures to Congress);  
5       section 1034 of title 10, United States Code (gov-  
6       erning disclosure to Congress by members of the  
7       military); section 2302(b)(8) of title 5, United  
8       States Code (governing disclosures of illegality,  
9       waste, fraud, abuse, or public health or safety  
10      threats); the Intelligence Identities Protection Act of  
11      1982 (50 U.S.C. 421 et seq.) (governing disclosures  
12      that could expose confidential Government agents);  
13      and the statutes which protect against disclosures  
14      that could compromise national security, including  
15      sections 641, 793, 794, 798, and 952 of title 18,  
16      United States Code, and section 4(b) of the Subver-  
17      sive Activities Control Act of 1950 (50 U.S.C.  
18      783(b)). The definitions, requirements, obligations,  
19      rights, sanctions, and liabilities created by such Ex-  
20      ecutive order and such statutory provisions are in-  
21      corporated into this agreement and are control-  
22      ling.'”.

23               (2) NONDISCLOSURE POLICY, FORM, OR AGREE-  
24      MENT IN EFFECT BEFORE THE DATE OF ENACT-  
25      MENT.—A nondisclosure policy, form, or agreement



1 that was in effect before the date of enactment of  
2 this Act, but that does not contain the statement re-  
3 quired under section 2302(b)(13) of title 5, United  
4 States Code, (as added by this Act) for implementa-  
5 tion or enforcement—

6 (A) may be enforced with regard to a cur-  
7 rent employee if the agency gives such employee  
8 notice of the statement; and

9 (B) may continue to be enforced after the  
10 effective date of this Act with regard to a  
11 former employee if the agency posts notice of  
12 the statement on the agency website for the 1-  
13 year period following that effective date.

14 (c) RETALIATORY INVESTIGATIONS.—

15 (1) AGENCY INVESTIGATION.—Section 1214 of  
16 title 5, United States Code, is amended by adding  
17 at the end the following:

18 “(h) Any corrective action ordered under this section  
19 to correct a prohibited personnel practice may include fees,  
20 costs, or damages reasonably incurred due to an agency  
21 investigation of the employee, if such investigation was  
22 commenced, expanded, or extended in retaliation for the  
23 disclosure or protected activity that formed the basis of  
24 the corrective action.”

1           (2) DAMAGES.—Section 1221(g) of title 5,  
2           United States Code, is amended by adding at the  
3           end the following:

4           “(4) Any corrective action ordered under this  
5           section to correct a prohibited personnel practice  
6           may include fees, costs, or damages reasonably in-  
7           curred due to an agency investigation of the em-  
8           ployee, if such investigation was commenced, ex-  
9           panded, or extended in retaliation for the disclosure  
10          or protected activity that formed the basis of the  
11          corrective action.”.

12 **SEC. 105. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

13          Section 2302(a)(2)(C) of title 5, United States Code,  
14          is amended by striking clause (ii) and inserting the fol-  
15          lowing:

16                 “(ii)(I) the Federal Bureau of Inves-  
17                 tigation, the Central Intelligence Agency,  
18                 the Defense Intelligence Agency, the Na-  
19                 tional Geospatial-Intelligence Agency, the  
20                 National Security Agency, the Office of the  
21                 Director of National Intelligence, and the  
22                 National Reconnaissance Office; and

23                 “(II) as determined by the President,  
24                 any executive agency or unit thereof the  
25                 principal function of which is the conduct

1 of foreign intelligence or counterintel-  
2 lligence activities, provided that the deter-  
3 mination be made prior to a personnel ac-  
4 tion; or”.

5 **SEC. 106. DISCIPLINARY ACTION.**

6 Section 1215(a)(3) of title 5, United States Code, is  
7 amended to read as follows:

8 “(3)(A) A final order of the Board may im-  
9 pose—

10 “(i) disciplinary action consisting of re-  
11 moval, reduction in grade, debarment from  
12 Federal employment for a period not to exceed  
13 5 years, suspension, or reprimand;

14 “(ii) an assessment of a civil penalty not to  
15 exceed \$1,000; or

16 “(iii) any combination of disciplinary ac-  
17 tions described under clause (i) and an assess-  
18 ment described under clause (ii).

19 “(B) In any case brought under paragraph (1)  
20 in which the Board finds that an employee has com-  
21 mitted a prohibited personnel practice under section  
22 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C) , or (D),  
23 the Board may impose disciplinary action if the  
24 Board finds that the activity protected under section  
25 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D)

1 was a significant motivating factor, even if other fac-  
2 tors also motivated the decision, for the employee's  
3 decision to take, fail to take, or threaten to take or  
4 fail to take a personnel action, unless that employee  
5 demonstrates, by preponderance of evidence, that  
6 the employee would have taken, failed to take, or  
7 threatened to take or fail to take the same personnel  
8 action, in the absence of such protected activity.”

9 **SEC. 107. REMEDIES.**

10 (a) **ATTORNEY FEES.**—Section 1204(m)(1) of title 5,  
11 United States Code, is amended by striking “agency in-  
12 volved” and inserting “agency where the prevailing party  
13 was employed or had applied for employment at the time  
14 of the events giving rise to the case”.

15 (b) **DAMAGES.**—Sections 1214(g)(2) and  
16 1221(g)(1)(A)(ii) of title 5, United States Code, are  
17 amended by striking all after “travel expenses,” and in-  
18 serting “any other reasonable and foreseeable consequen-  
19 tial damages, and compensatory damages (including inter-  
20 est, reasonable expert witness fees, and costs).” each place  
21 it appears.

22 **SEC. 108. JUDICIAL REVIEW.**

23 (a) **IN GENERAL.**—Section 7703(b) of title 5, United  
24 States Code, is amended by striking the matter preceding  
25 paragraph (2) and inserting the following:

1       “(b)(1)(A) Except as provided in subparagraph (B)  
2 and paragraph (2) of this subsection, a petition to review  
3 a final order or final decision of the Board shall be filed  
4 in the United States Court of Appeals for the Federal Cir-  
5 cuit. Notwithstanding any other provision of law, any peti-  
6 tion for review shall be filed within 60 days after the  
7 Board issues notice of the final order or decision of the  
8 Board.

9       “(B) During the 5-year period beginning on the effec-  
10 tive date of the Whistleblower Protection Enhancement  
11 Act of 2010, a petition to review a final order or final  
12 decision of the Board that raises no challenge to the  
13 Board’s disposition of allegations of a prohibited personnel  
14 practice described in section 2302(b) other than practices  
15 described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B),  
16 (C), or (D) shall be filed in the United States Court of  
17 Appeals for the Federal Circuit or any court of appeals  
18 of competent jurisdiction as provided under paragraph  
19 (2).”.

20       (b) REVIEW OBTAINED BY OFFICE OF PERSONNEL  
21 MANAGEMENT.—Section 7703(d) of title 5, United States  
22 Code, is amended to read as follows:

23       “(d)(1) Except as provided under paragraph (2), this  
24 paragraph shall apply to any review obtained by the Direc-  
25 tor of the Office of Personnel Management. The Director

1 of the Office of Personnel Management may obtain review  
2 of any final order or decision of the Board by filing, within  
3 60 days after the Board issues notice of the final order  
4 or decision of the Board, a petition for judicial review in  
5 the United States Court of Appeals for the Federal Circuit  
6 if the Director determines, in the discretion of the Direc-  
7 tor, that the Board erred in interpreting a civil service  
8 law, rule, or regulation affecting personnel management  
9 and that the Board's decision will have a substantial im-  
10 pact on a civil service law, rule, regulation, or policy direc-  
11 tive. If the Director did not intervene in a matter before  
12 the Board, the Director may not petition for review of a  
13 Board decision under this section unless the Director first  
14 petitions the Board for a reconsideration of its decision,  
15 and such petition is denied. In addition to the named re-  
16 spondent, the Board and all other parties to the pro-  
17 ceedings before the Board shall have the right to appear  
18 in the proceeding before the Court of Appeals. The grant-  
19 ing of the petition for judicial review shall be at the discre-  
20 tion of the Court of Appeals.

21       “(2) During the 5-year period beginning on the effec-  
22 tive date of the Whistleblower Protection Enhancement  
23 Act of 2010, this paragraph shall apply to any review ob-  
24 tained by the Director of the Office of Personnel Manage-  
25 ment that raises no challenge to the Board's disposition

1 of allegations of a prohibited personnel practice described  
2 in section 2302(b) other than practices described in sec-  
3 tion 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D).  
4 The Director of the Office of Personnel Management may  
5 obtain review of any final order or decision of the Board  
6 by filing, within 60 days after the Board issues notice of  
7 the final order or decision of the Board, a petition for judi-  
8 cial review in the United States Court of Appeals for the  
9 Federal Circuit or any court of appeals of competent juris-  
10 diction as provided under subsection (b)(2) if the Director  
11 determines, in the discretion of the Director, that the  
12 Board erred in interpreting a civil service law, rule, or reg-  
13 ulation affecting personnel management and that the  
14 Board's decision will have a substantial impact on a civil  
15 service law, rule, regulation, or policy directive. If the Di-  
16 rector did not intervene in a matter before the Board, the  
17 Director may not petition for review of a Board decision  
18 under this section unless the Director first petitions the  
19 Board for a reconsideration of its decision, and such peti-  
20 tion is denied. In addition to the named respondent, the  
21 Board and all other parties to the proceedings before the  
22 Board shall have the right to appear in the proceeding  
23 before the court of appeals. The granting of the petition  
24 for judicial review shall be at the discretion of the court  
25 of appeals.”.

1 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**  
2 **THE TRANSPORTATION SECURITY ADMINIS-**  
3 **TRATION.**

4 (a) IN GENERAL.—Chapter 23 of title 5, United  
5 States Code, is amended—

6 (1) by redesignating sections 2304 and 2305 as  
7 sections 2305 and 2306, respectively; and

8 (2) by inserting after section 2303 the fol-  
9 lowing:

10 **“§ 2304. Prohibited personnel practices affecting the**  
11 **Transportation Security Administration**

12 “(a) IN GENERAL.—Notwithstanding any other pro-  
13 vision of law, any individual holding or applying for a posi-  
14 tion within the Transportation Security Administration  
15 shall be covered by—

16 “(1) the provisions of section 2302(b) (1), (8),  
17 and (9);

18 “(2) any provision of law implementing section  
19 2302(b) (1), (8), or (9) by providing any right or  
20 remedy available to an employee or applicant for em-  
21 ployment in the civil service; and

22 “(3) any rule or regulation prescribed under  
23 any provision of law referred to in paragraph (1) or  
24 (2).

25 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-  
26 tion shall be construed to affect any rights, apart from



1 those described in subsection (a), to which an individual  
2 described in subsection (a) might otherwise be entitled  
3 under law.”.

4 (b) TECHNICAL AND CONFORMING AMENDMENT.—

5 The table of sections for chapter 23 of title 5, United  
6 States Code, is amended by striking the items relating to  
7 sections 2304 and 2305, respectively, and by inserting the  
8 following:

“2304. Prohibited personnel practices affecting the Transportation Security Ad-  
ministration.

“2305. Responsibility of the Government Accountability Office.

“2306. Coordination with certain other provisions of law.”.

9 (c) EFFECTIVE DATE.—The amendments made by  
10 this section shall take effect on the date of enactment of  
11 this section.

12 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**  
13 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**  
14 **MATION.**

15 (a) DEFINITIONS.—In this subsection—

16 (1) the term “agency” has the meaning given  
17 under section 2302(a)(2)(C) of title 5, United States  
18 Code;

19 (2) the term “applicant” means an applicant  
20 for a covered position;

21 (3) the term “censorship related to research,  
22 analysis, or technical information” means any effort

1 to distort, misrepresent, or suppress research, anal-  
2 ysis, or technical information;

3 (4) the term “covered position” has the mean-  
4 ing given under section 2302(a)(2)(B) of title 5,  
5 United States Code;

6 (5) the term “employee” means an employee in  
7 a covered position in an agency; and

8 (6) the term “disclosure” has the meaning  
9 given under section 2302(a)(2)(D) of title 5, United  
10 States Code.

11 (b) PROTECTED DISCLOSURE.—

12 (1) IN GENERAL.—Any disclosure of informa-  
13 tion by an employee or applicant for employment  
14 that the employee or applicant reasonably believes is  
15 evidence of censorship related to research, analysis,  
16 or technical information—

17 (A) shall come within the protections of  
18 section 2302(b)(8)(A) of title 5, United States  
19 Code, if—

20 (i) the employee or applicant reason-  
21 ably believes that the censorship related to  
22 research, analysis, or technical information  
23 is or will cause—

24 (I) any violation of law, rule, or  
25 regulation, except for an alleged viola-

1                   tion that is a minor, inadvertent viola-  
2                   tion, and occurs during the conscien-  
3                   tious carrying out of official duties; or

4                   (II) gross mismanagement, a  
5                   gross waste of funds, an abuse of au-  
6                   thority, or a substantial and specific  
7                   danger to public health or safety; and

8                   (ii) such disclosure is not specifically  
9                   prohibited by law or such information is  
10                  not specifically required by Executive order  
11                  to be kept classified in the interest of na-  
12                  tional defense or the conduct of foreign af-  
13                  fairs; and

14                  (B) shall come within the protections of  
15                  section 2302(b)(8)(B) of title 5, United States  
16                  Code, if—

17                  (i) the employee or applicant reason-  
18                  ably believes that the censorship related to  
19                  research, analysis, or technical information  
20                  is or will cause—

21                  (I) any violation of law, rule, or  
22                  regulation, except for an alleged viola-  
23                  tion that is a minor, inadvertent viola-  
24                  tion, and occurs during the conscien-  
25                  tious carrying out of official duties; or

1                   (II) gross mismanagement, a  
2                   gross waste of funds, an abuse of au-  
3                   thority, or a substantial and specific  
4                   danger to public health or safety; and  
5                   (ii) the disclosure is made to the Spe-  
6                   cial Counsel, or to the Inspector General of  
7                   an agency or another person designated by  
8                   the head of the agency to receive such dis-  
9                   closures, consistent with the protection of  
10                  sources and methods.

11               (2) DISCLOSURES NOT EXCLUDED.—A disclo-  
12               sure shall not be excluded from paragraph (1) for  
13               any reason described under section 2302(f)(1) or (2)  
14               of title 5, United States Code.

15               (3) RULE OF CONSTRUCTION.—Nothing in this  
16               section shall be construed to imply any limitation on  
17               the protections of employees and applicants afforded  
18               by any other provision of law, including protections  
19               with respect to any disclosure of information be-  
20               lieved to be evidence of censorship related to re-  
21               search, analysis, or technical information.

1 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**  
2 **FOR CRITICAL INFRASTRUCTURE INFORMA-**  
3 **TION.**

4 Section 214(c) of the Homeland Security Act of 2002  
5 (6 U.S.C. 133(c)) is amended by adding at the end the  
6 following: "For purposes of this section a permissible use  
7 of independently obtained information includes the disclo-  
8 sure of such information under section 2302(b)(8) of title  
9 5, United States Code."

10 **SEC. 112. ADVISING EMPLOYEES OF RIGHTS.**

11 Section 2302(c) of title 5, United States Code, is  
12 amended by inserting ", including how to make a lawful  
13 disclosure of information that is specifically required by  
14 law or Executive order to be kept classified in the interest  
15 of national defense or the conduct of foreign affairs to the  
16 Special Counsel, the Inspector General of an agency, Con-  
17 gress, or other agency employee designated to receive such  
18 disclosures" after "chapter 12 of this title".

19 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**  
20 **ANCE.**

21 Section 1212 of title 5, United States Code, is  
22 amended by adding at the end the following:

23 "(h)(1) The Special Counsel is authorized to appear  
24 as amicus curiae in any action brought in a court of the  
25 United States related to any civil action brought in con-  
26 nection with section 2302(b) (8) or (9), or as otherwise

1 authorized by law. In any such action, the Special Counsel  
2 is authorized to present the views of the Special Counsel  
3 with respect to compliance with section 2302(b) (8) or (9)  
4 and the impact court decisions would have on the enforce-  
5 ment of such provisions of law.

6 “(2) A court of the United States shall grant the ap-  
7 plication of the Special Counsel to appear in any such ac-  
8 tion for the purposes described under subsection (a).”.

9 **SEC. 114. SCOPE OF DUE PROCESS.**

10 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of  
11 title 5, United States Code, is amended by inserting “,  
12 after a finding that a protected disclosure was a contrib-  
13 uting factor,” after “ordered if”.

14 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title  
15 5, United States Code, is amended by inserting “, after  
16 a finding that a protected disclosure was a contributing  
17 factor,” after “ordered if”.

18 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**  
19 **MENTS.**

20 (a) IN GENERAL.—

21 (1) REQUIREMENT.—Each agreement in Stand-  
22 ard Forms 312 and 4414 of the Government and  
23 any other nondisclosure policy, form, or agreement  
24 of the Government shall contain the following state-  
25 ment: “These restrictions are consistent with and do

1 not supersede, conflict with, or otherwise alter the  
2 employee obligations, rights, or liabilities created by  
3 Executive Order 13526 (75 Fed. Reg. 707; relating  
4 to classified national security information) or any  
5 successor thereto; section 7211 of title 5, United  
6 States Code (governing disclosures to Congress);  
7 section 1034 of title 10, United States Code (gov-  
8 erning disclosure to Congress by members of the  
9 military); section 2302(b)(8) of title 5, United  
10 States Code (governing disclosures of illegality,  
11 waste, fraud, abuse, or public health or safety  
12 threats); the Intelligence Identities Protection Act of  
13 1982 (50 U.S.C. 421 et seq.) (governing disclosures  
14 that could expose confidential Government agents);  
15 and the statutes which protect against disclosure  
16 that may compromise the national security, includ-  
17 ing sections 641, 793, 794, 798, and 952 of title 18,  
18 United States Code, and section 4(b) of the Subver-  
19 sive Activities Act of 1950 (50 U.S.C. 783(b)). The  
20 definitions, requirements, obligations, rights, sanc-  
21 tions, and liabilities created by such Executive order  
22 and such statutory provisions are incorporated into  
23 this agreement and are controlling.”

24 (2) ENFORCEABILITY.—

1           (A) IN GENERAL.—Any nondisclosure pol-  
2           icy, form, or agreement described under para-  
3           graph (1) that does not contain the statement  
4           required under paragraph (1) may not be im-  
5           plemented or enforced to the extent such policy,  
6           form, or agreement is inconsistent with that  
7           statement.

8           (B) NONDISCLOSURE POLICY, FORM, OR  
9           AGREEMENT IN EFFECT BEFORE THE DATE OF  
10          ENACTMENT.—A nondisclosure policy, form, or  
11          agreement that was in effect before the date of  
12          enactment of this Act, but that does not con-  
13          tain the statement required under paragraph  
14          (1)—

15                 (i) may be enforced with regard to a  
16                 current employee if the agency gives such  
17                 employee notice of the statement; and

18                 (ii) may continue to be enforced after  
19                 the effective date of this Act with regard  
20                 to a former employee if the agency posts  
21                 notice of the statement on the agency  
22                 website for the 1-year period following that  
23                 effective date.

24          (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-  
25          EES.—Notwithstanding subsection (a), a nondisclosure



1 policy, form, or agreement that is to be executed by a per-  
2 son connected with the conduct of an intelligence or intel-  
3 ligence-related activity, other than an employee or officer  
4 of the United States Government, may contain provisions  
5 appropriate to the particular activity for which such docu-  
6 ment is to be used. Such policy, form, or agreement shall,  
7 at a minimum, require that the person will not disclose  
8 any classified information received in the course of such  
9 activity unless specifically authorized to do so by the  
10 United States Government. Such nondisclosure policy,  
11 form, or agreement shall also make it clear that such  
12 forms do not bar disclosures to Congress or to an author-  
13 ized official of an executive agency or the Department of  
14 Justice that are essential to reporting a substantial viola-  
15 tion of law, consistent with the protection of sources and  
16 methods.

17 **SEC. 116. REPORTING REQUIREMENTS.**

18 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

19 (1) REPORT.—Not later than 40 months after  
20 the date of enactment of this Act, the Comptroller  
21 General shall submit a report to the Committee on  
22 Homeland Security and Governmental Affairs of the  
23 Senate and the Committee on Oversight and Govern-  
24 ment Reform of the House of Representatives on the  
25 implementation of this title.

1           (2) CONTENTS.—The report under this para-  
2 graph shall include—

3                   (A) an analysis of any changes in the num-  
4 ber of cases filed with the United States Merit  
5 Systems Protection Board alleging violations of  
6 section 2302(b) (8) or (9) of title 5, United  
7 States Code, since the effective date of this Act;

8                   (B) the outcome of the cases described  
9 under subparagraph (A), including whether or  
10 not the United States Merit Systems Protection  
11 Board, the Federal Circuit Court of Appeals, or  
12 any other court determined the allegations to be  
13 frivolous or malicious;

14                  (C) an analysis of the outcome of cases de-  
15 scribed under subparagraph (A) that were de-  
16 cided by a United States District Court and the  
17 impact the process has on the Merit Systems  
18 Protection Board and the Federal court system;  
19 and

20                  (D) any other matter as determined by the  
21 Comptroller General.

22 (b) MERIT SYSTEMS PROTECTION BOARD.—

23           (1) IN GENERAL.—Each report submitted an-  
24 nually by the Merit Systems Protection Board under  
25 section 1116 of title 31, United States Code, shall,

1 with respect to the period covered by such report, in-  
2 clude as an addendum the following:

3 (A) Information relating to the outcome of  
4 cases decided during the applicable year of the  
5 report in which violations of section 2302(b) (8)  
6 or (9) (A)(i), (B)(i), (C), or (D) of title 5,  
7 United States Code, were alleged.

8 (B) The number of such cases filed in the  
9 regional and field offices, the number of peti-  
10 tions for review filed in such cases, and the out-  
11 comes of such cases.

12 (2) FIRST REPORT.—The first report described  
13 under paragraph (1) submitted after the date of en-  
14 actment of this Act shall include an addendum re-  
15 quired under that subparagraph that covers the pe-  
16 riod beginning on January 1, 2009 through the end  
17 of the fiscal year 2009.

18 **SEC. 117. ALTERNATIVE REVIEW.**

19 (a) IN GENERAL.—Section 1221 of title 5, United  
20 States Code, is amended by adding at the end the fol-  
21 lowing:

22 “(k)(1) In this subsection, the term ‘appropriate  
23 United States district court’, as used with respect to an  
24 alleged prohibited personnel practice, means the United  
25 States district court for the judicial district in which—